



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CRIMINAL APPEAL NO.24 OF 2017

From Original Case File No.981 of 2016 at Ogembo SPM's Court

STEPHEN ONYIMBO OKIOMA.....APPELLANT

VERSUS

REPUBLIC OF KENYA.....RESPONDENT

(Appeal from the original conviction and sentence of the Senior Magistrate's Criminal Case File NO.981 OF 2016 at Ogembo SPM'S Court before Hon. R.M.Ateya)

JUDGMENT

1. Stephen Onyimbo Okioma hereinafter referred to as the appellant was charged before the SPM's Court at Ogembo Law Courts on the 26th of May 2016 with the offence of Stealing in a Dwelling House C/Sec 279 (b) of the Penal Code. He pleaded guilty to the said offence after the charge was read to him. His co-accused persons pleaded not guilty to the said offence and the alternative charges of Handling Stolen Property C/Sec 322(1) (2) of the Penal Code.
2. The appellant filed a Petition of Appeal on the 24th of March 2017, seeking to have the conviction and sentence quashed and set aside and that he be acquitted. His grounds are that he pleaded guilty unknowingly, that he was not informed of the reason of his detention, he was not informed of the evidence the prosecution intended to rely on nor did he have reasonable access to the evidence. That the learned Magistrate erred in law and facts in convicting and sentencing him when the facts given in Court did not support the charge and that the Learned Magistrate erred in law and facts in failing to appreciate the principles of sentencing in that the Appellant was a first offender, the goods were recovered and that the sentence was excessive.
3. At the hearing of the appeal, the appellant informed the court that the complainant was his mother. That she has forgiven him. He was jailed for 7 years. He is 26 years old. That he did not understand the charges and that everything happened so fast in Court. He did not steal from his mother. That he does not recall what happened in Court. He has been in jail for 2 years and 3 months.
4. Mr. Otieno Learned State Counsel submitted that he is constrained to concede to the appeal. That having read the Appellant's mitigation the Learned Magistrate should have entered a plea of not guilty as he states that his mother was aware that he was selling the things.

DETERMINATION

5. I have considered the Appellants and the Prosecution's submissions together with the record of the trial Court. The lower court record indicates that the Appellant pleaded guilty to a charge of **Stealing in a Dwelling house C/Sec 279(b) of the Penal code**. The charge was read to the appellant in Ekegusii language. He pleaded, "*It is true*". During the hearing of his appeal he indicated that he does not understand Ekegusii and that he grew up in Luo land and that he does not understand Ekegusii language. The plea was taken on the 26/5/2016 and the facts read out to the appellant on the 27/5/2016 and his response was, "*The facts are true*". The Prosecution indicated that the appellant was a first offender. His mitigation was as follow, "*It was not my wish. I was in college but dropped out due to lack of fees. Our land had been leased. I had no food and no job so I took the items to sell and get money for my upkeep. My mother was aware I was selling the items. I never intended to hurt her. I am sorry. That is all.*"
6. At the time of sentencing the Learned Magistrate stated that he had considered the pre-sentencing report and noted that the accused now appellant is a risk to not only himself but also his wife and mother. That his mother is the complainant and she is not ready to have him back home. That she also admits to having been covering up for him. He noted that the appellant is not liable to serve a non-custodial sentence and sentenced him to 7 years in jail.
7. On the 18/10/2016 the Complainant withdrew the charges against the 2nd, 3rd and 4th Accused persons who were charged with Handling Stolen Goods.

8. The accused in his mitigation stated that his mother was aware of what he was doing. I agree with the Learned State Counsel's submission that at that stage a plea of not guilty ought to have been entered. The pre-sentence report also indicates that his mother used to cover for him though he is serial offender. The conviction and sentence are hereby set aside. The next issue is whether the appellant should be subjected to a re-trial. In the case of **Fatehali Manji vs. Republic 1966 (EALR)** at page 343 the Court of Appeal set down the principles which a court should consider when considering to order a retrial. The court stated as follows;

***“In general a retrial will be ordered only when the original trial was illegal or defective; it will not be ordered when the conviction is set aside because of insufficiency of evidence or for the purpose of enabling the prosecution to fill gaps in its evidence at the first trial; even where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame, it does not necessarily follow that a retrial should be ordered; each case must depend on its own facts and circumstances and an order for retrial should be made where the interests of justice require it.*”**

I have considered the circumstances of the appellant's case and applying the above principles to the present case I note that; a plea of not guilty ought not to have been entered by the learned Magistrate after listening and recording to the appellant's mitigation as the appellant stated that his mother knew about the sale of the stolen items. The next issue is whether there should be a retrial. The complainant is the mother of the appellant she opted to withdraw the charges against accused nos. 2, 3 and 4. The appellant has served about 2 years and 3 months. His mother who is the complainant has informed the court that she has forgiven him and that with time they have healed and they will accept him back. Some of the items were recovered from the co-accused persons of the appellant who are the complainant's co-wife and nephews. I note that the witnesses would be readily available if a retrial is ordered, however the complainant has indicated that she had healed and has forgiven her son. The appellant has learnt his lesson and since the mother has forgiven him and considering the time he has served I will not order a re-trial. The conviction is quashed and the sentence set aside. The appellant shall be set free forthwith, unless lawfully held. It is so ordered.

Dated signed and delivered this **14th** day of **June 2018**.

R.E.OUGO

JUDGE

In the presence of;

Appellant in person Present

State Counsel Mr. Otieno

Rael Court Clerk